STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals

Holbrook, Jr., PJ, Zahra and Owens, JJ.

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	Supreme Court Docket No. 122548
vs.	Court of Appeals No. 232041
JONATHAN D. HICKMAN, Defendant-Appellant.	Lower Court No. 00-018884-FJ-1

BRIEF ON APPEAL - APPELLEE

* ORAL ARGUMENT REQUESTED *

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STATEMENT OF JURISDICTION

The Defendant-Appellant's appeal as of right was denied by the Court of Appeals on September 17, 2002. *People v Hickman*, unpublished opinion per curiam of the Court of Appeals, decided September 17, 2002, (Docket No. 232041). The Defendant's delayed application for leave to appeal to the Supreme Court was filed on or about October 16, 2002. The Court granted the delayed application in an Order dated July 3, 2003. The Court therefore has jurisdiction in this matter pursuant to Const 1963, art 6, § 4; MCR 7.301(A)(2); and MCL 600.215(3).

COUNTERSTATEMENT OF QUESTION INVOLVED

There is no requirement that counsel be provided to suspects at an on-the-scene identification procedure, and that is as it should be. In any event, the record made at a pretrial hearing held herein demonstrated that an independent basis existed for the victim's identification of the Defendant. Under these circumstances, did the trial court clearly err when it admitted the victim's on-the-scene identification of the Defendant into evidence?

The trial court answered "NO".

The Court of Appeals answered "NO".

The Plaintiff-Appellee contends that the answer is "NO".

The Defendant-Appellant contends that the answer is "YES".

COUNTERSTATEMENT OF FACTS

The People have concluded that the Defendant-Appellant's Statement of Facts requires no supplementation or correction at this juncture. Additional facts are, however, stated *infra*, as they become pertinent.

ARGUMENT

The trial court did not clearly err when it admitted the victim's on-the-scene identification of the defendant into evidence. There is no requirement that counsel be provided to suspects at an on-the-scene identification procedure, and that is as it should be. In any event, the record made at a pretrial hearing held herein demonstrated that an independent basis existed for the victim's identification of the Defendant.

A. SUMMARY OF ARGUMENT

In its Order of July 3, 2003, granting the Defendant-Appellant's delayed application for leave to appeal, the Court limited its consideration of this matter "to the issue whether counsel is required before an on-the-scene identification can be admitted at trial."[1] (246a) In arguing that there was no reversible error in the admission of the identification into evidence, the Plaintiff-Appellee would initially note that, pursuant to *People v Anderson*[2], there is a general rule that there is a right to counsel at all pretrial identification procedures. An exception to that rule, however, controls for prompt, on-the-scene identifications or "showups", such as the one employed in the case *sub judice,* without any requirement that counsel be provided.[3]

The People would, however, contend that it would be cleaner, simpler, and more principled to simply jettison the *Anderson* rule and replace it with the federal

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[1] For his part, Defendant-Appellant Hickman seeks to broaden the inquiry to include whether he was also deprived of his right to due process of law when he was subjected to an "unduly and unnecessarily suggestive" on-the-scene identification procedure. (Appellant's Brief, 13)

[2] *People v Anderson*, 389 Mich 155, 168 (1973).

[3] See *People v Winters*, 225 Mich App 718, 727 (1997).

rule announced in *Kirby v Illinois*[4] and *Moore v Illinois*[5], to the effect that there is no right to counsel at corporeal identification procedures until adversarial proceedings have begun.[6] That is the point in the proceedings where the right to counsel under the Sixth Amendment of the United States Constitution and its counterpart under the Michigan Constitution, Const 1963, art 1, § 20, generally attaches.[7]

As for due process concerns, those requirements under the Federal Constitution are satisfied by analyzing a given identification procedure in terms of its suggestiveness or lack thereof.[8] Although this Court has at times demonstrated an inclination to provide greater protections under the Michigan Constitution's counterpart to the Fifth Amendment, Const 1963, art 1, § 17[9], that would seem to be the exception rather than the rule[10], and there is no compelling reason to depart from the federal rule in this situation. That rule allows for the continued use of an effective investigative tool, while at the same time providing adequate safeguards to diminish the possibility of the conviction of innocent people due to misidentification, something that is in the interest of no one.

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[4] *Kirby v Illinois*, 406 US 682; 92 S Ct 1877; 32 L Ed 2d 411 (1972).

[5] *Moore* v *Illinois*, 434 US 220; 98 S Ct 458; 54 L Ed 2d 424 (1977).

[6] *Winters, supra* at 725.

[7] *People* v *Cheatham*, 453 Mich 1, 9, n 8 (1996) (Opinion by BOYLE, J.).

[8] See *Moore, supra; Kirby, supra.*

[9] See, e.g., *People v Bender*, 452 Mich 594 (1996).

[10] See *Cheatham, supra* at 10 (Opinion by BOYLE, J.).

In addition, the People submit that even if the Court were to determine that the on-the-scene identification procedure used in the instant case was invalid, there was nevertheless an independent basis for the victim's identification of the Defendant, and so that identification was properly admitted into evidence.[11] Finally, even if it should not have been admitted, any such error was harmless in nature. The Court of Appeals opinion dated September 17, 2002, affirming the Defendant-Appellant's convictions and sentences should be affirmed in turn by this Court.

B. PRESERVATION OF ISSUE

The Defendant-Appellant preserved the aforementioned claim of error by raising it in his Motion to Strike Warrant and Complaint and its supporting brief, and then arguing it at the hearing on the motion. (18a-19a; 1b-6b)

C. STANDARD OF REVIEW

The People accept the Defendant-Appellant's statement of the applicable standard.[12]

D. DISCUSSION

In *People v Anderson*, this Court held, pursuant to *United States v Wade*[13], that a defendant's right to counsel attached to all pretrial identification procedures.[14] This

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[11] See *People v Gray*, 457 Mich 107 (1998).

[12] *See also People* v *Hamilton*, 465 Mich 526, 529-530 (2002); *People* v *Custer*, 465 Mich 319, 325-326 (2001).

[13] *United States* v *Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

[14] *Anderson, supra* at 168. The *Anderson* opinion did, however, allow for the fact that there are certain "recognized justifications for absence of counsel at eyewitness

rule, as well as other ones concerning pretrial identification found in *Anderson*[15], was reaffirmed the following year in *People v Jackson*[16].

The *Jackson* Court acknowledged that these rules were not constitutionally required:

> "The ... *Anderson* rules ... represent the conclusion of this Court, independent of any Federal constitutional mandate, that, both before and after commencement of the judicial phase of a prosecution, a suspect is entitled to be represented by counsel at a corporeal identification...."[17]

The authority for the promulgation of the *Anderson* rules instead arose from the Court's

> "constitutional power to establish rules of evidence applicable to judicial proceedings in Michigan courts..."[18]

Although *Jackson* was years later to be overruled in part on other grounds in *McDougall v Schanz*[19], *Anderson* itself and its rules remain good law in Michigan.[20] That is not to say, however, that there currently exists in Michigan a right to

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identification procedures." *Anderson, supra* at 187, n 23. Among these are "prompt `on the scene' corporeal identifications within minutes of the crime", citing *Russell v United States*, 133 US App DC 77; 408 F2d 1280 (1969).

[15] *Anderson, supra* at 168-169.

[16] *People v Jackson*, 391 Mich 323, 338-339 (1974).

[17] *Id.* at 338.

[18] *Id.* The Court of Appeals in *People v Williams*, 244 Mich App 533, 539 (2001), however, indicated that the *Anderson* rules are grounded in the Fifth Amendment right to counsel.

[19] *McDougall v Schanz,* 461 Mich 15 (1999)

[20] See *Winters, supra* at 727.

counsel at prompt on-the-scene identifications. Relying upon the dicta in *Anderson* which was referred to *supra* in note four of this brief, the Court of Appeals in *People v Winters* held:

> "...that it is proper and does not offend the Anderson requirements for the police to promptly conduct an on-the-scene identification."[21]

Identification procedures which satisfy this holding do not violate a "defendant's *Anderson*-based `right to counsel'"[22]

The *Winters* Court provided this rationale:

> "Such on-the-scene confrontations are reasonable, indeed indispensable, police practices because they permit the police to immediately decide whether there is a reasonable likelihood that the suspect is connected with the crime and subject to arrest, or merely an unfortunate victim of circumstance."[23]

Although the *Winters* rule works reasonably well in practice, as evidenced by its operation in the case *sub judice* at the trial court and Court of Appeals levels, the People would nevertheless maintain that the better reasoned approach is the one provided by Judge (now Justice) Young in the course of his extensive and scholarly opinion in *Winters*, to the effect that the *Anderson* rule itself should be replaced with the

> "federal rule, as announced in *Kirby* and adopted in *Moore*, that the right to counsel provided in *Wade* attaches only to corporeal

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[21] *Id.*

[22] *Id.* at 728; see also *People v Libbett*, 251 Mich App 353, 359, 361 (2002).

[23] *Winters, supra* at 728.

[24] *Id.* at 725.

> identifications conducted at or after the initiation of adversary judicial criminal proceedings. *Moore, supra* at 226-227, 98 S Ct at 463-464."[24]

In seeking to support such a change in the law, the People would begin by noting that in Michigan a criminal defendant's right to counsel arises out of basically four constitutional provisions, beginning with the Sixth Amendment of the United States Constitution, which provides in pertinent part that

> "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of counsel for his defence."

The 1963 Michigan Constitution includes language similar to that of the Sixth Amendment in article 1, § 20, which states that

> "[i]n every criminal prosecution, the accused shall have the right ... to have the assistance of counsel for his or her defense...."

Then there is a prophylactic right to counsel found in the United States Supreme Court's jurisprudence relating to the Fifth Amendment right against compelled self-incrimination and to due process.[25] This alternative right to counsel is distinct and not necessarily coextensive with the right to counsel afforded criminal defendants under the Sixth Amendment and its Michigan counterpart.[26]

Of these constitutional sources, it is the most clear that Defendant had no right to counsel at his on-the-scene identification under the Sixth Amendment, in that the United States Supreme Court has made it abundantly clear that the Sixth Amendment right to counsel

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[25] US Const Am V, and its Michigan corollary, Const 1963, art 1, § 17.

[26] *People v Bladel (After Remand),* 421 Mich 39, 50-51 (1984); *Williams, supra* at 538.

> "does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings--whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."'[27]

In light of this basic principle, that Court has held that that the right to counsel announced in *Wade, supra,* only attaches to corporeal identifications conducted "at or after the initiation of adversary judicial criminal proceedings...."[28]

The People contend that the result should be the same under art 1, § 20 of the state constitution, in that this Court stated in *People v Reichenbach*[29] that "art 1, § 20 does not afford greater rights than the Sixth Amendment." That statement was based on the observation made in *People v Pickens*[30] that

> [T]here exists no structural differences with regard to the right to assistance of counsel between federal and Michigan provisions. Moreover, no peculiar state or local interests exist in Michigan to warrant a different level of protection with regard to the right to counsel in the instant case. Both the federal and the state provisions originated from the same concerns and to protect the same rights.[31]

It follows from this correspondence between the two constitutional provisions that the right to counsel attaches under art 1, § 20, at the same time that its federal

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[27] *Texas v Cobb*, 532 US 162, 167-168; 121 S Ct 1335, 1340; 149 L Ed 2d 321 (2001), quoting *McNeil v Wisconsin*, 501 US 171, 175; 111 S Ct 2204; 115 L Ed 2d 158 (1991). See also *Libbett, supra* at 359, n 2.

[28] *Kirby* supra at 689. *Kirby* was a plurality opinion, but it was subsequently adopted by the Court in *Moore, supra* at 226-227.

[29] *People v Reichenbach*, 459 Mich 109, 119 (1998).

[30] *People v Pickens*, 446 Mich 298 (1994).

[31] *Id.* at 318. *(Footnote omitted.)*

counterpart does, which is when adversary judicial proceedings have been initiated.[32] It thus seems apparent that there is no right to counsel at an on-the-scene identification under art 1, § 20.

The next question then is that of whether a suspect in custody has a constitutional right to counsel at an on-the-scene identification under either the Fifth Amendment of the United States Constitution, or art 1, § 17 of the Michigan Constitution. In response to that inquiry, the People would submit that, as was set forth *supra*, in the quotation from *Winters*[33], the federal rule is that due process requires any alleged problem in an identification procedure used prior to the initiation of formal proceedings to be dealt with in terms of whether the methods used were unnecessarily suggestive to the point that they create a clear danger of irreparable mistaken identification[34]:

> "When a person has not been formally charged with a criminal offense, *Stovall* strikes the appropriate constitutional balance between the right of a suspect to be protected from prejudicial procedures and the interest of society in the prompt and purposeful investigation of an unsolved crime."[35]

Kirby, Moore and their progeny indicate that this suggestiveness test satisfies the requirements of due process, and that there is therefore no due process right to

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[32] *Cobb, supra* at 167-168; *Cheatham, supra* at 9, n 8; *Bladel, supra* at 52.

[33] *Winters, supra* at 725.

[34] *Id.*, citing *Stovall v Denno,* 388 US 293; 87 S Ct 1967; 18 L Ed 2d 1199 (1967), and *Anderson, supra* at 168; see also *Moore, supra* at 227.

[35] *Kirby, supra* at 691, and repeated in *Winters, supra* at 725.

counsel at on-the-scene identification procedures.[36]

That is not, however, the end of the matter, for this Court has at times chosen to afford greater protection of rights than have the federal courts. *Anderson* would seem to be a good example of this phenomenon; another is *People v Kurylczyk*[37], in which, largely in reliance upon *Anderson*[38], the Court declined to follow the United States Supreme Court's holding in *United States v Ash*[39] that counsel is not required at a photographic lineup, and held instead that

> "[i]n the case of photographic identifications, the right of counsel attaches with custody."[40]

In yet another example, the Court in *People v Bender* divided sharply on whether Michigan should afford more rights than had the United States Supreme Court in *Moran v Burbine*[41] to suspects in police custody regarding notification to them of the immediate availability of counsel to consult with them on the question of whether to waive their *Miranda*[42] rights. In holding that Michigan law does

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[36] *Moore, supra* at 226-227; *Kirby, supra* at 690-691; *Jones v Kemp*, 794 F2d 1536, 1539-1540 (CA 11, 1986).

[37] *People v Kurylczyk*, 443 Mich 289 (1993).

[38] *Id. at* 297-298.

[39] *United States v Ash*, 413 US 300; 93 S Ct 2568; 37 L Ed 2d 619 (1973).

[40] *Kurylczyk, supra* at 302.

[41] *Moran v Burbine*, 475 US 412; 106 S Ct 1135; 89 L Ed 2d 410 (1986).

[42] Referring to *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

afford greater rights, three justices[43] signed the lead opinion in which Justice Cavanagh wrote that

> "[t]he dissent asserts that Const 1963, art 1, § 17 provides no greater protection than the Fifth Amendment. However, this statement, as a general rule for this Court to follow, is clearly unsupportable."[44]

The three remaining justices[45] strongly disagreed:

> "The restrictions the lead opinion attributes to art. 1, § 17 rest only on its belief that a different interpretation is more `desirable' than that set forth in the constitution or in our previous decisions. A belief that the law as we would write it is more desirable than the law as written has no place in constitutional interpretation, or in the faithful adherence to our oath of office."[46]

The People would note that this disagreement over the relationship between the Fifth Amendment and Const 1963, art 1, § 17 was renewed a week later in *Cheatham*[47].

The People would suggest that the better view is that the two provisions should be interpreted the same way with respect to the issue presently before the Court, for there seems to be no compelling reason to interpret them differently in

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[43] Justices Cavanagh, Levin, and Mallett.

[44] *Bender, supra* at 613, n 17 (Opinion by CAVANAGH, J.). The fourth vote for the holding in *Bender* came from Chief Justice Brickley, who deemed it better to describe it as a prophylactic rule, rather than as one grounded in Const 1963, art 1, §'s 17 & 20. *Id.* at 620-621 (Opinion by BRICKLEY, C.J.). The People would also point out that while Chief Justice Brickley's opinion is labeled "concurring", it was signed by four justices, and was thus the opinion of the Court. *Id.* at 623.

[45] Justices Boyle, Riley, and Weaver.

[46] *Bender, supra* at 636 (Dissenting Opinion by BOYLE, J.).

[47] *Cheatham, supra* at 45 (Opinion by CAVANAGH, J.).

this context.[48] Indeed, unlike the federal rule a majority of the Court obviously felt uncomfortable with in *Bender*, the federal rule stated in *Kirby* and *Moore* seems to be a perfectly fine one for addressing the concerns about eyewitness identifications the Defendant raises in his brief.

Examining the validity of an on-the-scene identification procedure in terms of suggestiveness, while not introducing a right to counsel into the mix, is, in the People's estimation, probably the best approach available for handling this stage of the investigation of both assaultive and property crimes. While the focus in this type of claim is generally on the suspect's obvious interest in not being wrongly convicted of a crime, the People would point out that victims, police, prosecutors, and society as a whole also share in that interest—nobody gains from convicting and jailing an innocent person while the actual perpetrator remains at large.

The federal rule serves to permit an important tool of law enforcement to continue but with adequate safeguards, and does so in a more coherent way than does the routine use of the *Winters* exception to the rule supposedly in force here. The impractical *Anderson* standard should be jettisoned, and Const 1963, art 1, § 17 should be interpreted the same way that the Fifth Amendment has been by the federal courts and apparently by most states[49] so as not to mandate a right to counsel at on-the-scene identifications.

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[48] See *Id.* at 10, n 11 (Opinion by BOYLE, J.); *Sitz v Dep't of State Police*, 443 Mich 744, 763 (1993); *People v Carter*, 250 Mich App 510, 520 (2002).

[49] See 3 Ringel, Searches & Seizures, Arrests and Confessions (2d ed), § 31:5, pp 31-7 – 31-9.

It follows then that Defendant was not denied his right to counsel in the on-the-scene identification procedure conducted in the case *sub judice*. Furthermore, in light of the Court's decision to limit its consideration of this issue to the right-to-counsel question (246a), the People surmise that the Court is satisfied with the Court of Appeals' disposition of the alternative claim that the identification was unduly suggestive (243a-244a), and so the People will not trouble the Court with any further discussion of it. In sum then, it is apparent that the Defendant is not entitled to any relief pursuant to the instant claim of error.

The People would, however, wish to point out that the same conclusion would still pertain even if there had been a violation of Defendant's right to counsel in this matter, in that there was an independent basis for Mr. Walker's identification of the Defendant.[50] If a witness has been exposed to an invalid identification procedure, the witness's in-court identification will not be allowed unless the prosecution shows by clear and convincing evidence that the in-court identification will be based upon a sufficiently independent basis to purge the taint of the illegal identification.[51]

In *Gray*, this Court considered eight factors to determine if an independent basis existed for the victim's in-court identification following an impermissibly suggestive identification:

1- Prior relationship with or knowledge of the defendant;

2- Opportunity to observe the offense (time, lighting, proximity);

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[50] *Gray, supra* at 114-115, citing *Anderson, supra* at 169.

[51] *Gray, supra* at 114-115; *People v Colon,* 233 Mich App 295, 304 (1998).

3- Length of time between the offense & the disputed identification;

4- Accuracy or discrepancies in the pre-lineup or showup description & the defendant's actual description;

5- Any previous proper identification or failure to identify the defendant;

6- Any identification prior to the lineup or showup of another person as defendant;

7- The nature of the alleged offense, the physical & psychological state of the victim;

8- Any idiosyncratic or special features of the defendant.[52]

Any findings of fact by the trial court with regard to the propriety of an identification procedure are reviewed for clear error.[53]

In the present case, testimony was taken on Defendant's Motion to Strike Warrant and Complaint[54] on September 19 and 20, 2000, some three weeks before the trial commenced on October 10. At the conclusion of the testimony and the arguments of counsel, the learned trial court judge, in light of the testimony and his understanding of the pertinent legal principles, denied the motion. (92a-93a) The People contend that upon a fair reading of the record made during those two days of testimony, it cannot be said that that ruling, as well as the references to that record offered in support of said ruling, was clearly erroneous.

In supporting that contention, the People would refer the Court to the following key excerpts from the testimony: Mr. Walker testified that two men had approached

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[52] *Gray, supra* at 116.

[53] *Id.* at 115; *Kurylczyk, supra* at 303.

[54] As the trial prosecutor pointed out, the title of the motion was a misnomer—it was actually a motion to suppress Mr. Walker's identification testimony. (19a)

and robbed him at gunpoint on July 11, 2000. (27a-28a) During the course of that transaction, which lasted about three to four minutes, the witness was able to get a good look at the faces and clothing of both of the perpetrators, in that the robbery scene was amply illuminated by light from a car wash and a street light, and both robbers came quite close to the victim; Mr. Walker was able to identify Defendant as the one who was holding the gun. (29a-30a)

After the incident, the victim called 911 from a nearby pay phone, and conveyed descriptions of his assailants; he described one of them as wearing a hat and a chain with a medallion.[55] (32a-33a) At the hearing he identified Defendant as the man who had been so attired. (33a)

The police responded, spoke with the victim, and left. (34a) When they returned several minutes later, they told Mr. Walker that they had someone in custody, and they took him to where the Defendant was being held in the back seat of a patrol car. (34a-35a)

Upon arriving, the witness/victim stepped out of the car and looked at Defendant's face, hat, and clothing as he sat in the car, and he was able to identify Defendant "as soon as I set eyes on him" as the man who had pointed the gun at him, even though the two of them had not previously met. (35a-37a, 50a) The victim made this identification only twenty to thirty minutes after the robbery had taken place; he

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[55] At first, the victim described that medallion as a cross, but later he realized it was a money sign. (33a)

[56] Referring to *Wade, supra.*

made another one days later on at Defendant's preliminary examination. (37a, 40a)

At the Wade[56] hearing, Mr. Walker was unequivocal that his identifications of the Defendant were not based on his having seen Defendant sitting in the patrol car, or on what the police had told him; he had rather identified Defendant because Defendant was in fact one of the robbers. (37a-39a) The victim stated that "there is no doubt" that Defendant was the man who had pointed the gun at him during the robbery. (39a)

Officer Brian Lipe testified at the second day of the *Wade* hearing that it was he who had driven the victim to the location where the Defendant had been detained and placed in a squad car. (55a) Upon viewing the Defendant, Walker said to the officer, "That's the guy who had the gun." (Id) Officer Lipe had only asked the victim to look at Defendant to see if he was involved in the robbery. (56a)

Officer Lipe described the identification as quick and easy:

> "As soon as I shined the light on him [Defendant], he [the victim] said, 'That's the motherfucker who had the gun.'...there was no doubt in his [the victim's] voice. (66a)

The People contend that, in light of this testimony, it cannot be said that the trial court clearly erred either in denying the motion to suppress the victim's identification of Defendant, or in the findings of fact advanced in support of that denial. The victim had a good look at Defendant's face and clothing with the benefit of adequate lighting. The identification was made only twenty to thirty minutes after the robbery, and the police had only asked Walker in a neutral manner if he could identify a suspect.

Mr. Walker then proceeded to demonstrate not only that he could identify Defendant by face but also by clothing, and he was able to do so almost instantaneously. From the totality of the circumstances, it is apparent that there was an independent basis for the victim's identification of the Defendant.[57]

The People would also suggest that the admission of Mr. Walker's identification testimony was harmless beyond a reasonable doubt.[58] Saginaw Police Sergeant Brent Vanderhaar testified that on July 11, 2000, at approximately 2:20 a.m. he responded to a radio call regarding reported robbery. He drove around the area in which the robbery had taken place until he spotted a man fitting the description of one of the robbers. He said the man walked behind his car as he passed, and then turned in the opposite direction. When the officer exited his car, the man began running. The sergeant pursued the man on foot while radioing for help. He said that he saw the suspect pull something out from his right side, and then he saw something silver or chrome "fly" toward a house. Another officer intervened, and the suspect was caught. He identified the Defendant as the person he had chased. (136a-143a)

Sergeant Vanderhaar testified that he went back and looked where he saw the object thrown, and he found a chrome handgun. He said that the radio bulletin occurred at 2:19 a.m., and Defendant was in custody at 2:25 a.m. He said that

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[58] See *Gray, supra* at 115.

[59] A preserved constitutional error does not merit appellate relief if it is determined to have been harmless beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 774 (1999); *People v Anderson (After Remand)*, 446 Mich 392, 405-406 (1994).

Defendant had a two-way radio in his hand when he was apprehended. The police found the other radio behind a house after they pressed the pager feature, and the radio rang. (144a-153a)

It is, in light of all of these circumstances, plain that Defendant was one of the two robbers, and Mr. Walker's identification of him was merely corroborative of the other proofs. Any error in the admission of that identification should be deemed harmless beyond a reasonable doubt.

It follows then that there are three independent grounds for denying the Defendant any relief pursuant to the instant claim of error: One, since there is no requirement that counsel be provided for an on-the-scene identification procedure, the failure to proffer counsel in the procedure used in the case *sub judice* did not render that procedure invalid; two, there was in any event an independent basis for the victim's identification of the Defendant; and three, any error in the admission of the identification evidence constituted harmless error. Defendant's convictions and corresponding sentences should be affirmed.

D. CONCLUSION

The People thus ask this Honorable Court to grant no relief pursuant to this issue.

SUMMARY AND RELIEF SOUGHT

Wherefore, the Plaintiff-Appellee respectfully requests that this Honorable Court affirm the Per Curiam Opinion of the Court of Appeals, which affirmed the Defendant-Appellant's convictions and sentences.

Respectfully submitted,

MICHAEL D. THOMAS (P23539)
PROSECUTING ATTORNEY

J. Thomas Horiszny

Dated: March 5, 2004.

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STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
Holbrook, Jr., PJ, Zahra and Owens, JJ.

PEOPLE OF THE STATE OF MICHIGAN, **Plaintiff-Appellee,**	**Supreme Court** **Docket No. 122548**
vs.	**Court of Appeals** **No. 232041**
JONATHAN D. HICKMAN, **Defendant-Appellant.**	**Lower Court** **No. 00-018884-FJ-1**

STATE OF MICHIGAN)
) SS.
COUNTY OF SAGINAW)

MARIA A. VESCIO SIAN, being sworn, states that on March 5, 2004, she mailed by UPS Next Day Air – Mail Service, the original plus twenty-four (24) copies of Appellee's Brief on Appeal – Oral Argument Requested and Appendix, together with Proof of Service, to the Michigan Supreme Court Clerk; she also mailed one copy to Michigan Court of Appeals, 925 W. Ottawa St., P.O. Box 30022, Lansing, MI 48909-7522; one copy to Saginaw County Circuit Court Clerk, 111 S. Michigan Ave., Saginaw, MI 48602; two copies to attorney for Defendant-Appellant, Lyle N. Marshall, Assistant Defender, State Appellate Defender Office, 340 Business & Trade Center, 200 Washington Square, North, Lansing, MI 48913, and one copy to the Attorney General Office, Criminal Appellate Division, Attn. Ms. Brenda Turner, Assistant in Charge, P.O. Box 30217, Lansing, MI 48909, by placing the documents in the United States mail, properly addressed, with first-class postage fully paid.

Dated: March 5, 2004

Maria A. Vescio Sian
MARIA A. VESCIO SIAN

Subscribed and sworn to before me
on March 5, 2004.

Beth A. Bauer
BETH A. BAUER, Notary Public
Saginaw County, Michigan
My Commission Expires: April 10, 2007